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No.

In The

Supreme Court of the United States

October Term, 1997

MARGARET E. LIEN, WALTRAUD H. METZLER,

Petitioners,

vs.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Merit Systems Protection Board policy of not assuming jurisdiction over prohibited personnel practices (contained in the Federal Statute) committed by Federal Agencies violate the law?

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit, dated April 14, 1988, is unreported and is reproduced as Appendix A. The Order of the Merit Systems Protection Board appears as Appendix B and the initial decision of the Merit Systems Protection Board appears as Appendix C.

STATEMENT OF JURISDICTION

The subject matter jurisdiction of the Merit Systems Protection Board is at issue. Jurisdiction for the appeal is invoked under 28 U.S.C. § 1254(1).

NATURE OF THE CASE

In this appeal, the Petitioners challenge the United States Court of Appeals for the Federal Circuit in upholding the Merit Systems Protection Board policy of not reviewing Federal Agency violations of the prohibited personnel practices contained in the Statute.

STATEMENT OF THE FACTS

1. The Agency (General Services Administration) used non-validated testing material to exclude Petitioners from consideration for the final selection on a merit promotion action.

2. One of the Petitioners had a Settlement Agreement on an EEO complaint which had direct impact on the present merit promotion action.

3. The Uniform Guidelines for testing material was not followed.

REASONS FOR GRANTING THE WRIT

1. The Merit Systems Protection Board maintains, that they review only those employment practices that are applied by the Office of Personnel Management, and not the employment practices applied by other individual Federal Agencies. However, the Statute 5 U.S.C. § 1205(a) lists four areas in which the Merit Systems Protection Board has jurisdiction. Item Number (4) is the area in which they have jurisdiction to review the Office of Personnel Management. It appears from their policy that they have limited their review exclusively to only Item number (4), and have ignored Items (1), (2) , and (3).

2. The Statute at 5 U.S.C. § 1205(a) also lists Items (1), (2), and (3) in which Congress gave the Merit Systems Protection Board jurisdiction on prohibited personnel practices.

3. Item number (3) not only gives them jurisdiction, but it *requires* that Merit Systems Protection Board conduct, from time-to-time, special studies relating to civil service and to other merit systems practices in the Executive Branch and to report to Congress on whether the public interest in a civil service free of prohibited personnel practices is being adequately protected. When the Merit Systems Protection Board has set a policy not to review prohibited personnel practices which are committed by individual Federal agencies, they are in direct violation of this section.

CONCLUSION

In light of the Statutory requirements on the Merit Systems Protection Board, the U.S. Supreme Court should reverse the U.S. Court of Appeals for the Federal Circuit on this issue and remand the case back for them to require that the Merit Systems Protection Board follow the Statutory requirements and handle all prohibited personnel practices violations.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DECIDED APRIL 14, 1998

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-3075, -3076

MARGARET E. LIEN,

Petitioner,

and

WALTRAUD H. METZLER,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: April 14, 1998

Before MICHEL, *Circuit Judge*, ARCHER, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

MICHEL, *Circuit Judge*.

Appendix A

DECISION

Margaret Lien and Waltraud Metzler ("petitioners") seek review of the Merit Systems Protection Board's (the "Board's") decision in their consolidated appeal. *Lien v. General Serv. Admin.*, Docket Nos. SE-3443-97-0396-1-1 and SE-3443-97-0397-1-1 (1997). After consolidating their individual appeals, the Board dismissed their consolidated appeal without a hearing for lack of jurisdiction. The Administrative Judge's initial decision of June 27, 1997 became the final Board decision on October 29, 1997, pursuant to 5 C.F.R. § 1201.113(b), when the full Board denied their petition for review. Petitioners timely petitioned this court for review. Because we conclude that petitioners did not meet their burden of establishing Board jurisdiction and that, having failed to make a non-frivolous allegation of jurisdiction, they were properly denied a hearing on the jurisdictional issue we *affirm*.

DISCUSSION

Petitioners' appeal concerns the procedures used by their employer, the General Services Administration ("GSA"), in selecting a candidate for the GS-13/14 position of Supervisory Contract Specialist advertised under Vacancy Announcement No. 9693842. Each of the applicants for this position, including petitioners, were interviewed and asked the same eleven questions. Based on the responses of the applicants to these questions, four finalists were selected and asked an additional five questions at a second interview. Petitioners were not among the four finalists. The individual selected for the position was one of the four finalists. Under several theories, petitioners disputed the legality of the procedure by which the four finalists were asked additional questions to which petitioners and the

other non-finalist applicants did not have an opportunity to respond. The Board dismissed petitioners' appeal after determining that it did not have jurisdiction to hear the appeal under any of the theories advanced by petitioners.

Petitioners' contentions on appeal raise two questions for our decision. The first is whether the Board had jurisdiction to hear petitioners' claims, and the second is whether petitioners made non-frivolous allegations supporting Board jurisdiction, for only such allegations would entitle them to an evidentiary hearing on the issue. The merits of petitioners' claims, however, are not before this court.

I.

The Board's jurisdiction is not plenary, but is, instead, limited to matters over which it has been expressly granted jurisdiction by statute or regulation. *See, e.g., Noguera v. Office of Personnel Management*, 878 F.2d 1422, 1424 (Fed. Cir. 1989).

Petitioners present three arguments in support of their contention that the Board has jurisdiction over their appeal. First, they argue that the procedure of giving only the four finalists an opportunity to respond to the five additional questions was a prohibited personnel practice under 5 U.S.C. § 2302(b) (1994). The Board can consider claims of prohibited personnel practices under section 2302(b) if the claim is made in conjunction with an otherwise appealable matter or if the claim is brought as an independent right of action under 5 U.S.C. § 1221 (1994). *See* 5 U.S.C. §§ 2302(b)(8), 7701(c)(2)(B) (1994); *see also Brodt v. Merit Sys. Protection Bd.*, 11 F.3d 1060, 1061 (Fed, Cir. 1993) ("Prohibited personnel practices

are cognizable by the Board only when they motivate an otherwise appealable personnel action."). However, section 2302(b) does not provide an independent ground for Board jurisdiction. *See Fair v. Department of Navy*, 66 M.S.P.R. 485, 488 (1995). Because petitioners' claims alleging that the procedures used by GSA constituted prohibited personnel practices were not either coupled with otherwise appealable personnel actions or brought as independent rights of action under section 1221, the Board lacks jurisdiction over the appeal.

Petitioners argue, second, that the Board has jurisdiction because the procedure followed by GSA violated the merit system principles set forth in 5 U.S.C. § 2301 (1994). However, like section 2302(b), section 2301 does not provide an independent basis for Board jurisdiction. *See Neal v. Department of Health & Human Serv.*, 46 M.S.P.R. 26, 28 (1990). The merit systems principles set forth in section 2301 are only intended to furnish guidance to federal agencies and do not constitute an independent source of Board jurisdiction. *Id.* Therefore, an alleged violation of these merit system principles cannot ground Board jurisdiction.

Petitioners argue, third, that the Board is given jurisdiction over their appeal by 5 C.F.R. §§ 300.103 and 300.104. Petitioners argue that the standards set forth in "Uniform Guidelines on Employee Selection Procedures" of Part 1607 of 29 C.F.R. were violated by GSA's selection procedure and that this constituted a violation of section 300.103. Petitioner Lien also argues that she was discriminated against in violation of section 300.103 because of her political affiliation. Section 300.104 gives the Board jurisdiction over claims that the Office of Personnel Management ("OPM") used employment practices that violate section 300,103. However, the jurisdictional grant

of section 300.104 applies only to employment practices followed by OPM; it does not provide the Board with jurisdiction over employment practices of other agencies, even if those employment practices violate section 300.103. *See* 5 C.F.R. § 300.104 (1997); *see also Hall v. Department of Air Force*, 12 M.S.P.R. 288, 289 (1982). Thus, because all of the improper employment practices alleged by petitioners were utilized by GSA and not OPM, section 300.104 does not give the Board jurisdiction over petitioners' appeal.

As to petitioners' request for an evidentiary hearing before the Board so they can prove facts to establish the Board's jurisdiction, petitioners are only entitled to such a hearing if they allege facts which if proven would establish Board jurisdiction, i.e., allege a non-frivolous basis for jurisdiction. *See Manning v. Merit Sys. Protection Bd.*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984). Even if petitioners established that GSA's procedure violated each of the statutes and regulations they cite, the Board, as explained above, still would not have jurisdiction over their appeal. Petitioners have not, therefore, alleged a non-frivolous basis for jurisdiction and, accordingly, it was not error for the Board to deny them a hearing.

For these reasons, the decision of the Board, dismissing petitioners' appeal without a hearing for lack of jurisdiction, is affirmed.

APPENDIX B — ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, DATED OCTOBER 29, 1997

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBERS
SE-3443-97-0396-I-1
SE-3443-97-0397-I-1

DATE: OCT 29, 1997

MARGARET E. LIEN, WALTRAUD H. METZLER,

Appellants,

v.

GENERAL SERVICES ADMINISTRATION,

Agency.

Bruce G. Williams, American Federation of Government Employees, Auburn, Washington, for the appellants.

Richard J. Moen, Esquire, Auburn, Washington, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair

Appendix B

ORDER

After full consideration, we DENY the appellants' petitions for review of the initial decision issued on June 27, 1997, because they do not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in these appeals. The initial decision in these appeals is now final. 5 C.F.R. § 1201.113(b).

* * *

FOR THE BOARD:

s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX C — INITIAL DECISION OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD SEATTLE FIELD OFFICE, DATED JUNE 27, 1997

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SEATTLE FIELD OFFICE

DOCKET NUMBERS
SE-3443-97-0396-I-1
SE-3443-97-0397-I-1

DATE: *June 27, 1997*

MARGARET E. LIEN, WALTRAUD H. METZLER,

Appellants,

v.

GENERAL SERVICES ADMINISTRATION,

Agency,

Bruce G. Williams, American Federation of Government Employees, Auburn, Washington, for the appellants.

Richard J. Moen, Esquire, Auburn, Washington, for the agency.

BEFORE

Carol J. Teather
Administrative Judge

Appendix C

INITIAL DECISION

INTRODUCTION

By appeals filed May 23, 1997, appellants Margaret E. Lien and Waltraud H. Metzler appealed the procedures used by the agency, the General Services Administration (GSA), in selecting a candidate for the GS-13/14 position of Supervisory Contract Specialist. Their appeals were consolidated for processing and decision, Appeal Files (AF) tabs 3 and 4. The parties were notified that there was a question as to the Board's jurisdiction over the matter appealed, and given an opportunity to respond. Acknowledgment Order, AF tab 2. The appellants have the burden of showing by preponderant evidence that the Board has jurisdiction over their appeals. *See Jasper v. United States Postal Service, 73* M.S.P.R. 367, 369 (1997).

For the reasons set forth below, the appeals are DISMISSED for lack of jurisdiction.

FINDINGS AND ANALYSIS

Appellant Lien is a GS-13 Supply Systems Analyst at the GSA, Paints and Chemicals Center in Auburn Washington. Lien File (LF) tab 8, subtab 4h. Appellant Metzl er is a GS-12 Contract Specialist at the same facility. LF tab 8, subtab 4e. Both appellants were among a number of applicants who applied for a GS-1102-13/14, Supervisory Contrac: Specialist position under Vacancy Announcement No. 9693842. Lien File (LF) tab 8, subtabs 4b, 4e, and 4h. All of the applicants, including the appellants, were interviewed and asked the same 11 questions. LF tab 8, subtab 4c. Based on their answers to these questions, four finalists were selected. These individuals were

given a second interview at which they were asked an additional five questions. LF tab 8, subtab 4d. The individual selected for the position was one of the four finalists. LF tab 8, subtab 4f. Neither of the appellants was a finalist or selected for the position.

The appellants claim that by selecting four finalists and giving them another interview and an additional five questions, the agency committed a prohibited personnel practice under 5 U.S.C. § 2302, violated the merit systems principles of 5 U.S.C, § 2301, and violated the technical standards for criterion-related validity studies of 29 C.F.R. § 1607.14B. LF tabs 1 and 6.

The Board's jurisdiction is not plenary, but is limited to those matters over which it has been given jurisdiction by statute or regulation. *Noguera v.* Office *of Personnel Management,* 878 F.2d 1422, 1424 (Fed. Cir. 1989); *Bautista v. Office of Personnel Management,* 74 KS.P.R. 47, 49 (1997); *Colbert v. Department of the Army,* 54 M.S.P.R. 492, 497 (1992).

The Board has jurisdiction to hear an appeal from a candidate for a position who believes that an "employment practice" applied to him by the Office of Personnel Management (OPM) violates a basic requirement of 5 C.F.R. § 300.103. *See* 5 C.F.R. § 300.104(a); *Hannon v. Office of Personnel Management,* 73 M.S.P.R. 613, 616 (1997). Section 300.103 provides, in pertinent part. as follows:

> An employment practice shall not discriminate on the basis of race, color, religion, sex, age, national origin, partisan political affiliation, or other nonmerit factor. Employee selection procedures shall meet the standards established by the

Appendix C

"Uniform, Guidelines on Employee Section Procedures" (1978), 43 FR 38290 (August 5, 1978) (codified in 29 C.F.R. Part 1607).

5 C.F.R. § 300-103(c). The term "employment practices" includes the development and use of examinations, qualification standards, tests, and other measurement instruments. 5 C.F.R. § 300. 101; *Hannon v. Office of Personnel Management*, 73 M.S.P.R. at 616.

As the Board stated in its decision in *Hannon v. Office of Personnel Management,* 73 M.S.P.R. 613 (1997), it has consistently held that Board jurisdiction in this area does not extend to appeals of an individual's score on a particular examination. Rather, the Board's jurisdiction is limited to claims that an "employment practice" is generally applied in a discriminatory fashion or is inherently biased against a certain group of individuals. *Hannon v. Office of Personnel Management*, 73 M.S.P.R. at 61617.

In the instant case, the appellants are not appealing an employment practice applied to them by the OPM. Rather, they are appealing an employment practice applied by their employing agency, GSA. Such a matter does not fall within the jurisdiction of the Board under 5 C.F.R. § 300.104(a). *See Walters v. United States Postal Service,* 65 M.S.P.R. 115, 118 (1994). Thus, I find the Board lacks jurisdiction over the appellants' claim that the agency's selection process violated 29 C.F.R. Part 1607 and 5 C.F.R. § 300.103.

Similarly, I find the Board lacks jurisdiction over the appellants' claims that the agency's selection process violated the merit systems principles set forth in 5 U.S.C. § 2301 and

constituted a prohibited personnel practice under 5 U.S.C. § 2302(b). The merit systems principles are intended to furnish guidance to Federal agencies and do not constitute an independent source of Board jurisdiction. *See Neal v. Department of Health and Human Services,* 46 M.S.P.R. 26, 28 (1990). Although the Board is authorized to adjudicate a claim of prohibited personnel practice where the claim is interposed as a defense to an appealable action, or brought as an independent right of action under 5 U.S.C. § 1221, the Board does not have jurisdiction over a claim, such as the appellants', that an employment practice of an agency constitutes a prohibited personnel practice. Section 2302(b) of 5 U.S.C. is not a source of Board jurisdiction. *See Fair* v. *Department* of *the Navy,* 66 M.S.P.R. 485, 488 (1995).

Additionally, I find that the appellants' nonselections for promotion do not fall within the Board's jurisdiction. Matters such as promotions and nonselections are not appealable to the Board. *See Clark v. Department of the Interior,* 68 M.S.P.R. 453, 457 (1995); *Walters v. United States Postal Service,* 65 M.S.P.R. 115, 118 (1994).

DECISION

The appeals are DISMISSED.

FOR THE BOARD:

s/ Carol J. Teather
Carol J. Teather
Administrative Judge

* * *